IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 136 of 1997
For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANTILAL VALLABHDAS & CO.

Versus

KARADIA MANDABHAI NATHUBHAI

Appearance: Mr.R.A. Patel, for MR MB KYADA for Petitioner
MR JITENDRA MALKAN for the Respondent.

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 12/01/2001

ORAL JUDGEMENT

1. The petitioner herein is the original plaintiff of Regular Civil Suit No.41 of 1992. The aforesaid suit was filed for recovery of certain amount from the defendant. The said suit was dismissed in absence of the plaintiff's Advocate on 6.9.1994. The petitioner thereafter preferred an application for setting aside the ex parte order of dismissal of the suit under the provisions of Order 9 Rule 9 of CPC. Since there was a delay of 18 days in preferring the said application, separate application for condonation of delay in preferring the application for setting aside the ex parte order was also given, which was registered as Civil Miscellaneous Application No.2 of 1995.

2. The learned trial Judge, however, after hearing both the sides, came to the conclusion that no sufficient cause was shown for condoning the delay. Therefore, the learned trial Judge dismissed the said application for condonation of delay. At the time of hearing of this Revision Application, it was argued by Mr.R.A. Patel for Mr.Kyada that the learned trial Judge has taken a very rigid view in deciding the application for condonation of delay. He has relied upon certain judgments of the Supreme Court to substantiate his say that in such matters, pragmatic view is required to be taken and even if the counsel for the party is negligent, the Court should not shut the doors of the litigant to decide his claim on merits.

The Supreme Court has laid down that in condonation of delay, liberal approach should be taken. There are numerous judgments of the Supreme Court on this aspect.

In Collector Land Acquisition, Anantnag and another v. Mst. Katiji and others, AIR 1987 SC 1353, the Supreme Court has stated that Section 5 is enacted in order to enable the Courts to do substantial justice to the parties by disposing of matters on `merits'. The expression "sufficient cause" employed by the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that the Court has been making a justifiably liberal approach in matters instituted in the Court, but the message does not appear to have percolated down to all the other Courts in the hierarchy. The Apex Court held that such a liberal approach should be adopted on principle as it is realized as under :-

> " ... ...
>
> 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
>
> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

... ... "

In another judgment of the Supreme Court in Smt. Lachi Tewari and others v. Director of Land Records and others, AIR 1984 SC 41, the Supreme Court was of the view that the petitioner had taken all reasonable care which he can take, because he had engaged three lawyers. Nothing more could be expected of him. Further, he had taken steps to file an early application to avoid being thrown out unheard. Ultimately, considering the aforesaid fact, the proceedings which was dismissed for default was restored to file.

3. On the other hand, Mr.Malkhan, for the respondent, argued that there is no jurisdictional error and, therefore, this Court should not disturb the discretionary order passed by the trial court since the

trial court has found that no sufficient cause was shown by the plaintiff for such condonation.

4. After hearing both the sides, I am of the opinion that the learned trial Judge has committed an error of jurisdiction in passing the impugned order. The law regarding condonation of delay is now well settled and if relevant aspect of the matter is not taken into consideration, it can be said that the Court has failed to exercise the jurisdiction vested in him under law. In the instant case, it cannot be said that the plaintiff was not willing to proceed further with his own suit. May be that some vigilance might not have been shown by the plaintiff or his Advocate, but that is not a ground for shutting the doors of the plaintiff at the threshold stage by not condoning the delay.

5. Considering the judgments of the Supreme Court, as cited by Mr.Patel, I am of the opinion that the delay in preferring the application is required to be condoned. This Revision Applicaiton is accordingly allowed. Civil Miscellaneous Application No.2 of 1995 preferred by the petitioner for condoning the delay in filing the application for setting aside the ex parte order is allowed. The delay in preferring the application under Order 9 Rule 9 of CPC is condoned. The effect of this order is that now the main Application under Order 9 Rule 9 to be taken on Board for hearing and deciding the same on merits. Since the proceedings are very old, the trial court is directed to decide the said application at the earliest, in any case, before 28 February, 2001.

Rule is made absolute to the aforesaid extent. No costs.

Writ of this Court to be sent to the trial court forthwith.

12th January, 2001 (P.B. Majmudar, J.)

****

(apj)